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OKEKE NWABUNIKE CHRISTOPHER & ANOR v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
KAMARDIN HASHIM J
B [CRIMINAL APPEALS NO: B-05-210 & 211-07-2014 (NGA)]
18 FEBRUARY 2016

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Dangerous Drugs Act 1952, s. 39B(2) – Accused persons convicted for trafficking in*
C *712.5g methamphetamine and sentenced to death – Drugs found in room occupied by accused persons – Whether arrested together – Whether had joint possession of drugs – Whether had full knowledge of drugs – Whether had control and custody of room and drugs – Common defence that drugs belonged to another man arrested together with accused persons – Whether defence probable – Whether there was*
D *nexus between accused persons and drugs – Whether conviction and sentence safe*

The appellants were charged at the High Court for trafficking in drugs, an offence under s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). It was the prosecution's case that a team of police personnel led by SP2 had carried out an ambush on an apartment after receiving information that a drug
E trafficking activity would take place at the said apartment. The police entered the apartment and found the second room to be locked. After knocking and not getting any response, SP2 kicked open the door and found two persons ('the appellants') inside. The appellants attempted to flee but were successfully apprehended after a brief struggle. A search carried out led to
F the discovery of packages on the floor next to the mattress, which were later confirmed by the chemist to contain 712.5g of methamphetamine. At the end of the prosecution's case, the trial judge found that the appellants had (i) joint possession of the drugs; and (ii) full knowledge of the drugs as they refused to open the door and tried to take flight. Satisfied that a *prima facie* case had
G been established, the appellants were called to enter their defence. The appellants denied knowledge of the drugs and their common defence was that the drugs belonged to a Chinese man who was arrested together with them. The first appellant testified that the room which the drugs were found was actually occupied by another tenant and not the second appellant. On the
H other hand, the second appellant testified that he had come to the apartment to meet a friend and was arrested on the ground floor. At the conclusion of trial, the trial judge held that the appellants failed to raise a reasonable doubt on the prosecution's case. The appellants were found guilty, convicted for the offence and sentence to death. Hence, the present appeal. The first appellant argued that the case against him was not proven beyond reasonable doubt.
I The second appellant submitted that the trial judge erred when His Lordship

found that there was joint possession because there was no evidence that the second appellant was an occupier and as such, the second appellant could not be said to have custody or control of the drugs.

Held (dismissing appeal by first appellant; allowing appeal by second appellant)
Per Kamardin Hashim J delivering the judgment of the court:

(1) There were no merits in the first appellant's argument that the case against the first appellant was not proven beyond reasonable doubt. The tenancy was under the first appellant's name and his belongings were found in the same room where the drugs were. As an occupier of the premise, the first appellant had custody or control of the room. The fact that the first appellant tried to flee and struggled with the police showed only one conclusion, that the first appellant had knowledge and possession of the drugs. Therefore, it was sufficient to fasten the elements of *mens rea* possession and presumed trafficking under s. 37(da) of the DDA to the first appellant. The conviction of the first appellant was safe. (paras 24 & 25)

(2) The evidence of the second appellant was not considered by the trial judge and as a result, there was no maximum evaluation of the evidence, prejudicing the second appellant. The trial judge did not discuss the important evidence that the second appellant went to the apartment to look for his friend and that he was arrested at the staircase before being brought to the room. The trial judge also failed to consider the first appellant's evidence that he did not know the second appellant and the second appellant was not his friend. There was no nexus between the second appellant and the drugs. The conviction of the second appellant was not safe. Therefore, the second appellant was acquitted and discharged. (paras 21 & 26)

Bahasa Malaysia *Headnotes*

Perayu-perayu dipertuduh di Mahkamah Tinggi kerana mengedar dadah, satu kesalahan di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Kes pendakwaan menyatakan bahawa satu pasukan pegawai polis yang diketuai oleh SP2 telah menyerbu sebuah pangsapuri selepas menerima maklumat bahawa satu aktiviti pengedaran dadah akan dijalankan di pangsapuri berkenaan. Pasukan polis memasuki pangsapuri dan mendapati bilik kedua berkunci. Selepas mengetuk dan tidak mendapat apa-apa respon, SP2 menendang buka pintu dan menjumpai dua orang ('perayu-perayu') di dalam bilik tersebut. Perayu-perayu cuba melarikan diri tetapi berjaya ditangkap selepas satu pergaduhan singkat. Satu carian menemukan bungkusan-bungkusan di atas lantai bersebelahan tilam yang kemudiannya disahkan oleh ahli kimia mengandungi 712.5g methamphetamine. Pada penutup kes pendakwaan, hakim bicara mendapati bahawa perayu-perayu mempunyai

(i) milikan bersama dadah; dan (ii) pengetahuan penuh tentang dadah kerana mereka enggan membuka pintu dan cuba melarikan diri. Berpuas hati bahawa satu kes *prima facie* berjaya dibuktikan, perayu-perayu dipanggil membela diri. Perayu-perayu menafikan pengetahuan mengenai dadah dan pembelaan bersama mereka adalah bahawa dadah tersebut milik seorang lelaki Cina yang ditangkap bersama-sama mereka. Perayu pertama memberi keterangan bahawa bilik di mana dadah tersebut dijumpai sebenarnya diduduki oleh seorang lagi penyewa dan bukan perayu kedua. Perayu kedua pula memberi keterangan bahawa dia datang ke pangsapuri untuk berjumpa dengan kawannya dan telah ditangkap di tingkat bawah. Pada penutup perbicaraan, hakim bicara memutuskan bahawa perayu-perayu gagal membangkitkan keraguan munasabah terhadap kes pendakwaan. Perayu-perayu didapati bersalah, disabitkan atas kesalahan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini. Perayu pertama menghujahkan bahawa kes terhadapnya tidak dibuktikan melampaui keraguan munasabah. Perayu kedua mendalihkan bahawa hakim bicara terkhilaf dalam memutuskan bahawa terdapat milikan bersama kerana tiada keterangan bahawa perayu kedua adalah penghuni dan dengan itu, perayu kedua tidak boleh dikatakan mempunyai jagaan atau milikan atas dadah.

Diputuskan (menolak rayuan perayu pertama; membenarkan rayuan perayu kedua)

Oleh Kamardin Hashim H menyampaikan penghakiman mahkamah:

(1) Tiada merit dalam hujahan perayu pertama bahawa kes terhadap perayu pertama tidak dibuktikan melampaui keraguan munasabah. Sewaan di bawah nama perayu pertama dan barang-barang kepunyaannya dijumpai di dalam bilik yang sama di mana dadah berada. Sebagai penghuni premis berkenaan, perayu pertama mempunyai jagaan dan kawalan bilik. Fakta bahawa perayu pertama cuba melarikan diri dan berlawan dengan polis membawa kepada hanya satu kesimpulan, bahawa perayu pertama mempunyai pengetahuan dan milikan dadah. Oleh itu, cukup untuk menghubungkan elemen *mens rea* milikan dan anggapan pengedaran di bawah s. 37(da) ADB dengan perayu pertama. Sabitan perayu pertama adalah selamat.

(2) Keterangan perayu kedua tidak dipertimbangkan oleh hakim bicara dan akibatnya, tiada penilaian maksimum terhadap keterangan dan ini memprejudis perayu kedua. Hakim bicara tidak membincangkan keterangan yang penting bahawa perayu kedua telah ke pangsapuri untuk berjumpa dengan kawannya dan bahawa dia ditahan di tangga sebelum dibawa ke bilik tersebut. Hakim bicara juga gagal mempertimbangkan keterangan perayu pertama bahawa dia tidak mengenali perayu kedua dan perayu kedua bukan kawannya. Tiada perhubungan antara perayu kedua dengan dadah. Sabitan perayu kedua tidak selamat. Oleh itu, perayu kedua dilepaskan dan dibebaskan.

Case(s) referred to:
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2006] 1 CLJ 857 FC ***(refd)***
Mazlani Mansor & Ors v. PP [2013] 1 LNS 1292 CA ***(refd)***
Mohamed Yatin Abu Bakar v. PP [1949] 1 LNS 50 HC ***(refd)***
Mohd Sharif Mohd Sahoji v. PP (Federal Court Criminal Appeal No: 05-274-11-2012 (w)) (Unreported) ***(refd)***
Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 SC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(da)

For the 1st appellant - Kitson Foong (Chew Jee San with him); M/s Kit & Assocs
For the 2nd appellant - Hisyam Teh Poh Teik (Sangeet Kaur Deo with him); M/s Teh Poh Teik & Co
For the respondent - Tengku Intan Suraya Tengku Ismail (Iswa Tonie with her); DPPs

[Editor's note: Appeal from High Court, Shah Alam; Criminal Appeal No: 45A-206-09-2012 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Kamardin Hashim J:

The Charge

[1] Both the appellants were charged together in the High Court at Shah Alam for trafficking in a dangerous drugs and the charge against them read as follows:

> That you together on 26th March 2012, at about 5.30 pm, at No: 3-02-17, Level 2, Pangsapuri Lagoon Perdana, Jalan PJS 9/1, Bandar Sunway, in the district of Subang Jaya, in the state of Selangor Darul Ehsan, in furtherance of the common intention of you all, did traffic in a dangerous drugs, *to wit* 712.5 grams of Methamphetamine; and thereby committed an offence under section 39(1)(a) of the Dangerous Drugs Act 1952 and punishable under section 39B(2) of the same Act read with section 34 of the Penal Code.

Brief Facts

[2] Brief facts of the case are as follows. On 26 March 2012, ASP Mohd Sahar bin Mohd Yunus (SP2) received information from a source of drug trafficking activity carried out at No: 3-02-17, Lagoon Perdana Condominium. SP2 with a team of police personnel decided to ambush the said premise. They arrived there at around 5.30pm and proceeded to the unit concerned.

[3] Upon arrival at the unit apartment, SP2 noticed the door was closed but not locked. SP2 opened the door and entered the apartment. There were three rooms in that apartment unit. On opening the first room which was not locked either, SP2 found the room to be empty and nothing incriminating was found inside the room.

[4] SP2 proceeded to the second room and found the room was locked. SP2 knocked the door and identified himself as a police officer. After waiting for about 30 seconds and not getting any response, SP2 kicked open the door. Once the door to the second room was wide opened, two persons identified as both the appellants rushed out knocking into SP2 and they tried to flee. Both the appellants were subdued after a brief struggle causing them to be hurt in the process.

[5] After being apprehended, both the appellants were brought back into the room where a search of the room was conducted. SP2 saw packages suspected to be drugs on the floor next to the mattress in the room. SP2 seized both the packages and brought to the Subang Jaya Police Station.

[6] The investigating officer, Inspector Mohd Saifulrizal bin Abu Bakar (SP3) sent the two packages to the chemist for analysis. The chemist, SP1 confirmed that the substance in the two packages were dangerous drugs namely methamphetamine to the net weight of 712.5g, the subject matter to the charge.

[7] Further investigation carried out by SP3 revealed that the first appellant was the tenant of the premise from where the drugs were found. A tenancy agreement was discovered and tendered in court as an exh. P23 (p. 296 appeal record vol. 3).

Findings By The Learned High Court Judge

[8] At the end of the prosecution's case, the learned trial judge found that a *prima facie* case has been made out. The learned trial judge made a finding that both the appellants had the joint possession of the drugs as the two packages were laying at a place visible and accessible to both of them. They were the only occupants of the room when the police raided the premise.

[9] The learned trial judge also made a finding that both the appellants had full knowledge of the illicit drugs as they refused to open the door when ordered to do so and both of them tried to flee. They struggled with the police and got hurt before being apprehended by the police.

[10] The learned trial judge invoked the presumption of trafficking under s. 37(da) of DDA based on the weight of the drugs seized. The learned trial judge was satisfied that there was no break in the chain of evidence and the court accepted the evidence of the chemist in relation to the drugs.

[11] Finally, the learned trial judge was satisfied that the prosecution had succeeded in proving a *prima facie* case against both the appellants and ordered them to enter their defence.

Defence Case

[12] Both the appellants gave evidence under oath. Their common defence was that there was a Chinese man who was arrested together with them. Both appellants said that the drugs belong to the Chinese man.

[13] The first appellant also testified that he had a fellow tenant who also stayed in the same apartment whose name was also Sunday but was not the second appellant. The first appellant further said that the room which the drugs were found was actually occupied by the said Sunday Okerie. Meanwhile the first appellant said that he himself stayed in the master bedroom.

[14] The second appellant on the other hand said that he had come to the apartment to meet a friend and he was arrested on the ground floor. The police then led him up to the apartment where the door was opened by the first appellant. Further, the second appellant said that he and the first appellant were forced to sit in the living room while the police carried out the search and found the Chinese man who was also arrested.

[15] Both the appellants denied any knowledge of the impugned drugs and went on to say that at no time did the police even show to them the drugs whilst they were at the apartment.

[16] At the end of the whole case, the learned trial judge concluded that there was absolutely no explanation from both the appellants of what made them wanting to flee from the room and putting up a struggle with the police before they were arrested. The learned trial judge found that both the appellants' defence had not raised a reasonable doubt on the persecution's case. Both the appellants were convicted and sentenced to death. Hence, the appeals before this court.

The Appeals

[17] Before us, learned counsel for the first appellant and learned counsel for the second appellant have raised a number of grounds in support of the appeals. For convenience, we shall deal each of them together in turn. We will also deal with grounds separately canvassed by both learned counsels.

Our Findings

[18] The first ground canvassed before us was in regard to the marking of the drug exhibits. Learned counsels argued that there was inconsistency in the markings of the drugs seized between the evidence given by the chemist (SP1) and the marking made by SP2. Both counsels argued that there was no explanation given, and as such the drug exhibits recovered by SP1 from the

A room was not the same before the trial judge. We found no merits in the argument of learned counsels. The markings "SS1" and "SS2" in SP1's evidence were done by SP3. SP3 had made a separate markings on the two packages, different from the markings made by SP1, who marked them separately as "S1" and "S2". We found that the packages marked as P26 and
B P27 had been identified by SP1, SP2 and SP3 during the trial. The learned trial judge had considered this issue in his judgment as at p. 16 of appeal record vol. 1, as follows:

> In this case there was no break in the chain of evidence and I was satisfied that the drugs seized by SP2 were the same drugs which were sent to the
C Chemist to be analysed and were the same drugs produced in Court.

[19] We shall now deal with the two grounds raised separately by learned counsel for the second appellant. The first ground was that, there was no *prima facie* case proven against the second appellant. Learned counsel argued that the trial judge erred when he found that there was joint possession.
D Learned counsel argument was based on four reasons, they are:

(a) there was no evidence that the second appellant was an occupier, mere presence in the room cannot amount to possession;

(b) as such, second appellant cannot be said to have custody or control of
E the two packages let alone possession of them;

(c) even assuming second appellant had knowledge of the presence of the two packages in the room, that knowledge alone is insufficient to fasten possession on him (see *Gooi Loo Seng v. PP* [1993] 3 CLJ 1); and

F (d) even accepting the evidence of SP2 that the second appellant fled and put up a struggle when the door was kicked opened, it only goes to show knowledge and nothing more.

[20] The learned trial judge in his judgment said both the appellants had joint possession of the drugs based on two factors. The two factors cited by
G the learned trial judge was that the drugs were laying at a place visible and accessible to both the appellants and that both of them had tried to flee and put up a struggle before being arrested. Learned counsel for the second appellant however argued that the second appellant cannot have joint possession with the first appellant when there is no evidence that the second appellant is also the occupier of the said room, there is no physical evidence
H like the DNA or fingerprints of the second appellant being found on the drug exhibits, no evidence for how long was the second appellant in the said room and that there was no evidence that the second appellant could exercise the power of disposal to the exclusion of all others apart from the first appellant. Learned counsel further argued that proximity and visibility are insufficient
I to prove possession (see *Mazlani Mansor & Ors v. PP* [2013] 1 LNS 1292; [2014] 2 MLJ 18; *Mohd Sharif Bin Mohd Sahoji v. PP* (Federal Court Criminal

Appeal No: 05-274-11-2012 (w)); *Gunalan Ramachandran & Ors v. PP* [2006] 1 CLJ 857; [2006] 2 AMR 465 and *Shamsuddin Hassan & Anor v. PP* [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428; [1991] 3 MLJ 314). A

[21] We found merits in the arguments put forward by learned counsel for the second appellant. It seems to us that the learned trial judge accepted the evidence of SP2 without considering the totality of the evidence before the learned trial judge at the end of the defence case. There was a failure to appreciate the defence's case on the part of the trial judge. The learned trial judge did not discuss in his judgment the important evidence regarding the second appellant that he went to the said condominium to look for his friend, that he was arrested at the staircase and brought to the said room, the room was not locked and was opened by the first appellant and that there was no nexus between the second appellant and the impugned drugs. The second appellant was not an occupier of that room and that second appellant tried to flee when he saw the first appellant had ran away. The learned trial judge also did not consider the first appellant's evidence that he does not know second appellant and second appellant is not his friend, Sunday Okirie who stayed together with him in the same unit. We agreed that the evidence in favour of the second appellant were not considered by the learned trial judge and as a result of which there was no maximum evaluation of the evidence, prejudicing the second appellant. B C D E

[22] In evaluating the defence version put up by both the appellants, the learned trial judge adopted a wrong approach. In his judgment, the learned trial judge said. F

> In this case there are 2 differing versions of evidence as to the events leading to the arrest of both the accused. One set of evidence is the one given by the prosecution and the other set is by the accused. In evaluating the defence in this case it is pertinent for the Court to first determine which set of evidence to believe.

[23] The learned trial judge chose to believe the prosecution's version for a simple reason that there was absolutely no reason for the police to antagonise both the appellants and no reason for SP2 to frame up both the appellants. In our opinion this is not the correct approach to the question of the guilt or innocence of the appellants. When an accused person is called to enter into his defence and the accused gave evidence, then the question is not which story is to be believed, but as to whether his evidence has raised a reasonable doubt on the truth of the prosecution evidence or as to the accused's guilt (see *Mohamed Yatin Abu Bakar v. PP* [1949] 1 LNS 50; [1950] 1 MLJ 57). G H

[24] As regards to the first appellant, we agree with the learned trial judge that the first appellant being the occupier of the premise, the first appellant had custody or control of the room where the two packages were found I

lying on the floor and the fact that the first appellant try to flee and struggle with the police show only one conclusion that the first appellant was in possession of the impugned drugs and had the required knowledge of the drugs. The learned trial judge found that the tenancy was under the name of the first appellant and his belongings were found in the same room where the drugs were. We are of the view that based on these evidence as found by the learned trial judge, it was sufficient to fasten the element of *mens rea* possession and thereafter an element of presumed trafficking under s. 37(da) of the Act on the part of the first appellant. We therefore found no merits in learned counsel for the first appellant's argument that the case against the first appellant was not proven beyond reasonable doubt.

[25] Looking at the evidence in totality, we were unanimous in our view that the conviction of the first appellant was safe. We therefore dismissed the appeal of the first appellant and we affirmed the conviction and sentence of the High Court.

[26] Similarly, based on the totality of the evidence and for the above said reasons, we were unanimous in our view that the conviction of the second appellant was not safe; we therefore allowed the appeal of the second appellant and set aside the conviction and sentence imposed by the High Court against the second appellant. The second appellant was acquitted and discharged.